

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

STATE OF NORTH DAKOTA, *et al.*,)
Plaintiffs,)
v.) Civil No. 3:15-cv-00059-PDW-ARS
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,)
Defendant.

PLAINTIFF STATES' STATUS REPORT

Plaintiff State of North Dakota, the other Plaintiff States¹, and Plaintiff-Intervenor, the Governor of the State of Iowa, Kimberly K. Reynolds (collectively, the “Plaintiff States”), respectfully submit this Status Report in response to this Court’s June 24, 2020 Order staying this action and requiring a status report from Plaintiff States every 90 days. ECF No. 325. Plaintiff States respectfully request that the Court continue the stay of this action pending final resolution of litigation in multiple forums (the “Related Litigation”) challenging the U.S. Environmental Protection Agency’s and the U.S. Army Corps of Engineers’ (collectively

¹Alaska, Arizona, Arkansas, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming.

“Agencies”) final rules entitled: “Definition of Waters of the United States—Recodification of Pre-Existing Rules,” 84 Fed. Reg. 56,626 (October 22, 2019) (“Recodification Rule”); and “Navigable Waters Protection Rule: Definition of ‘Waters of the United States,’” 85 Fed. Reg. 22,250 (April 21, 2020) (“2020 WOTUS Rule”). The Related Litigation seeks, in various forms, to either: (1) vacate the Recodification Rule and the 2020 WOTUS Rule nationwide and reinstate the 2015 WOTUS Rule that is the subject of this action; or (2) enjoin all or part of the Recodification Rule or 2020 WOTUS Rule.

STATUS REPORT

Since this Court’s Order granting the stay, and Plaintiff States’ last Status Report filed on June 21, 2021, the Related Litigation remains active with the potential to reinstate the 2015 WOTUS Rule at issue in this action:

1. As noted in the June 21, 2021 Status Report, the Agencies had filed, or planned to file, motions in select active forums requesting that those courts remand the 2020 WOTUS Rule to the Agencies without vacatur. Since the June 21, 2021 Status Report, the Agencies’ motions for remand without vacatur have been granted in the following forums: *Conservation Law Found. v. EPA*, 20-cv-010820 (D. Mass.) (Memorandum and Order of Remand and Dismissal (ECF No. 122 (September 1, 2021))); *Murray v. Wheeler*, 19-cv-1498 (N.D. N.Y.) (Text Order remanding the 2020 WOTUS Rule without vacatur (ECF No. 46 (September

7, 2021)); *California v. Wheeler*, 20-cv-03005 (N.D. Cal.) (Order Granting Motion to Remand (ECF No. 271 (September 16, 2021)) (noting that the need to reach the request for vacatur was moot).

2. The following case seeking to vacate the Recodification Rule and 2020 WOTUS Rule, and reinstate the 2015 WOTUS Rule, remains active. *Pascua Yaqui Tribe v. EPA*, 4:20-cv-00266 (D. Ariz.). In this case, the Court granted the Agencies' motion for remand, while separately vacating the 2020 WOTUS Rule. *Id.*, Order, ECF No. 99 (August 30, 2021). In the Order, the Court left open for consideration Plaintiffs' challenges to the Recodification Rule pending additional briefing, including ordering the parties to submit a proposal for further briefing on the Recodification Rule by September 29, 2021. *Id.* at 11. The effect of the Order is that the pre-2015 WOTUS Rule regulations are in effect in that forum, while an additional ruling could subsequently invalidate the Recodification Rule and reinstate the 2015 WOTUS Rule.

3. In response to the *Pascua Yaqui Tribe v. EPA* Order, on September 3, 2021, the Agencies announced that they "have halted implementation of the [2020 WOTUS Rule] and are interpreting "waters of the United States" consistent with the pre-2015 regulatory regime until further notice." See Current Implementation of Waters of the United States (available at: <https://www.epa.gov/wotus/current-implementation-waters-united-states>).

4. The following cases are still pending a decision on the Agencies' motions for remand without vacatur. *See Navajo Nation v. Wheeler*, 2:20-cv-00602 (D.N.M. June 22, 2020) (merits briefing has been stayed pending resolution of the Agencies' opposed motion for remand (*see* ECF No. 32 (Opposed Motion to Remand to Agency (June 22, 2021)); ECF No. 33 (Order Placing Briefing Schedule in Abeyance) (June 24, 2021)); *S.C. Coastal Conservation League v. Wheeler*, 20-cv-01687 (D. S.C.) (per the Court's order modifying the scheduling order, the Agencies must file their motion to remand without vacatur by September 29, 2021 (ECF No. 53 (September 1, 2021)); *Env'l. Integrity Project v. EPA*, 1:20-cv-01734 (D.D.C. June 25, 2020) (per the Court's July 28, 2021 Minute Order setting a briefing schedule on a motion to remand, briefing will conclude on September 17, 2021).

5. The following cases challenging the Recodification Rule remain in abeyance (or have been placed in abeyance since the last June 21, 2021 Status Report as noted below) pending the outcome of ongoing challenges to the 2020 WOTUS Rule and the Agencies' current rulemaking efforts: *Colorado v. EPA*, 20-cv-01461 (D. Col.) (The case was administratively placed in abeyance by joint motion of all parties (ECF No. 112 (July 14, 2021)); *S.C. Coastal Conservation League v. Wheeler*, 2:19-cv-03006 (D. S.C.); *Wash. Cattlemen's Assoc. v. EPA*, 19-cv-00569 (W.D. Wash.); *N.M. Cattle Growers' Assoc. v. EPA*, 19-cv-00988

(D. N.M.); *Chesapeake Bay Found. v. Wheeler*, 1:20-cv-1063 consolidated with 1:20-cv-1064 (D. Md.) (stayed on February 2, 2021); *Or. Cattlemen's Assoc. v. EPA*, 19-cv-00564 (D. Or.); *Puget Soundkeeper v. EPA*, 2:20-cv-950 (W.D. Wash).

CONCLUSION

The Related Litigation, which is the basis for the current stay of this action, remains active and has not been fully resolved. While some forums have remanded the 2020 WOTUS Rule to the Agencies without vacatur, one forum has vacated the 2020 WOTUS Rule and is still considering requests to vacate the Recodification Rule and reinstate the 2015 WOTUS Rule at issue in this action. Therefore, Plaintiff States respectfully request that this Court continue to stay this case pending resolution of the Related Litigation. Plaintiff States will file their next status report by December 20, 2021.

Dated: September 20, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September 2021, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF electronic filing system, which will send an electronic copy of this filing to all counsel of record.

s/ Paul M. Seby _____
Paul M. Seby